SUPREME COURT, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 1322

JOSEPH THOMAS McCAFFREY, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTICRARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on February 3, 1967, affirming the judgment of the District Court for the District of Colorado, entered upon a jury verdict, convicting the petitioner of having in his possession a certificate purporting to be a registration certificate issued pursuant to 50 U.S.C., App., Sections 451-471, which he knew to be falsely made, in violation of 50 U.S.C., App. §462(b).

Opinion Below

The opinion of the court below supporting the judgment sought to be reviewed (*infra*, App. A, pp. 13-16) is reported at 372 F.2d 482.

Jurisdiction

The judgment of the Court of Appeals was entered on February 3, 1967 (*infra*, App. A, p. 16). A petition for rehearing was denied on March 1, 1967. By order of Mr. Justice White, the time for filing a petition for certiorari was extended to April 30, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

Petitioner was arraigned May 21, 1965 at which time he refused to sign a waiver of indictment (R. 7). Petitioner was then indicted by indictment dated June 8, 1965, for having in his possession a certificate purporting to be a registration certificate issued pursuant to the provisions of 50 U.S.C., App. Sections 451-471 in violation of 50 U. S.C., App. §462(b). Section 462(b) applies to Selective Service certificates. The questions are:

(1) Whether a genuine form of a Selective Service certificate containing false information is a falsely made certificate within the meaning of the applicable law.

(2) Whether the petitioner who refused to waive indictment by grand jury was denied a fair trial upon failure of the government to produce grand jury testimony of a witness who testified before the grand jury

which returned the indictment and who testified at the trial because no transcription was made of testimony before the grand jury.

(3) Whether the petitioner who refused to waive indictment by grand jury was denied his constitutional rights under the Fifth Amendment to the United States Constitution upon failure of the government to produce grand jury testimony of a witness who testified before the grand jury which returned the indictment and who testified at the trial because no transcription was made of testimony before the grand jury.

(4) Whether the petitioner was denied a fair trial by reason of the trial court's refusal to give an instruction tendered by the petitioner in accordance with the terms of the statute §462(b).

Statutes Involved

The relevant provisions of the Constitution of the United States, and of the Universal Military Training Statute (50 U.S.C., App. §462(b) are set forth in Appendix B, *infra*, pp. 17-18).

Statement of the Case

The one-count indictment (R. 5) was filed on June 8, 1965 in the United States District Court for the District of Colorado after the petitioner had refused to waive indictment on May 21, 1965 (R. 7). The criminal proceedings against the petitioner were first initiated on April 9, 1965 upon a complaint filed before the United States Commissioner by a William J. Beavers, a Special Agent for

the Federal Bureau of Investigation (R. 3-4). This complaint alleged that the petitioner on March 5, 1965 was unlawfully in possession of a registration certificate issued pursuant to law but not duly issued to the petitioner. The Warrant of Arrest issued by the United States Commissioner also alleged that petitioner was unlawfully in possession of a registration certificate issued pursuant to law but not issued to the petitioner. The indictment, however, filed June 8, 1965, charged the petitioner with having in his possession a certificate purporting to be a registration certificate issued pursuant to 50 U.S.C., App. Sections 451-471, which he knew to be falsely made in violation of 50 U.S.C., App. §462(b) (R. 5).

Section 462(b) describes six categories of offenses. The indictment charged the petitioner with a violation of the fifth category which reads as follows "(5) who has in his possession any certificate purporting to be a certificate issued pursuant to this title [said sections], or rules and regulations promulgated hereunder, which he knows to be falsely made, reproduced, forged, counterfeited, or altered;"

The petitioner was tried on October 5, 1965 before a jury. The government called four witnesses. The government's evidence went to show that on March 5, 1965, the government's witness, Schossow, a deputy sheriff of Jefferson County employed by a roller rink at the time, approached the petitioner and his young brother Danny to inquire as to their ages because they were smoking and the regulations of the roller rink forbade minors under 18 from smoking. This witness testified that Danny produced a Selective Service card at the request of Schossow which card bore the name of and was issued to the petitioner. Schossow then testified that the petitioner,

though not requested to do so, submitted a Selective Service card, Exhibit 1, bearing the name of Joseph Thomas Scott. Schossow turned this card over to William J. Beavers of the Federal Bureau of Investigation because he, Schossow, already knew petitioner's name to be Joseph Thomas McCaffrey and because he noticed an erasure on Exhibit 1 (R. 17-19). Schossow admitted on cross-examination that the petitioner made no representations as to petitioner's intentions with respect to the card, nor why he had the card, or what he intended doing with the card (R. 26).

Beavers testified that petitioner came to Beaver's office voluntarily and informed him that he had purchased Exhibit 1 in blank in September, 1964, from a party known only as Chilly, and that Chilly filled out the card and the petitioner signed it. Beavers further testified that the petitioner told him that Exhibit 1 had never been used prior to March 5, 1965 (R. 39-48). Schossow did not testify before the grand jury. Beavers did testify before the grand jury and it was on his testimony that the indictment was returned. After Beavers had finished testifying on direct examination, the petitioner sought production of the grand jury testimony of Beavers but none was produced because, as the United States attorney explained, no court reporter was used to take testimony during the grand jury hearing (R. 41-42).

The Deputy State director of Selective Service for the State of Colorado identified the draft card, Exhibit 1, as a genuine certificate form. He further testified that an examination of Selective Service records in Colorado did not disclose a registrant named Thomas Joseph Scott, the name on Exhibit 1. He also testified that the alleged

clerk's signature on Exhibit 1 indicated it could not have been issued by the local board in Colorado (R. 55-57).

The Petitioner testified that he was well known to Schossow previous to March 5, 1965, and had shown his own draft card to Schossow on several previous occasions. Petitioner's testimony as to the draft card (Exhibit 1) was that while still under draft age he had purchased it from a person called "Chilly" in September, 1964, which Chilly filled out and petitioner then signed the name Joseph Thomas Scott. This draft card had never been used before. When Schossow asked petitioner for identification, petitioner handed Schossow petitioner's wallet not knowing the draft card was in the wallet, and Schossow extracted the draft card (Exhibit 1) from the wallet (R. 78-85).

The petitioner tendered an instruction which the Court of Appeals treated as in proper form. This instruction (R. 9) paraphrased the final sentence of §462(b) and would have instructed the jury that possession of a certificate not duly issued to the appellant would be sufficient to establish an intent to use the certificate for false identification unless the defendant explained his possession to the satisfaction of the jury. This instruction was refused.

Reasons for Granting the Writ

The petitioner stands convicted of the offense of having in his possession a certificate purporting to be a registration certificate issued pursuant to 50 U.S.C., App. Sections 451-471, which certificate he knew to be falsely made. The certificate in question does not come within the prohibition of §462(b)(5) because the certificate was

genuine as to form. This Court and the lower courts have held to the contrary and said that a falsely made certificate is one that is counterfeit in form without regard to the truth or falsity of its contents. On the other hand, a false certificate is one that is genuine as to form but false as to content. The decision below is in conflict with these prior rulings.

The failure to transcribe grand jury testimony deprived the petitioner of a fair trial and of constitutional safeguards. Under rulings of this Court a defendant in a criminal trial is entitled to grand jury minutes after certain foundation is laid, as a matter of right. In England, and especially during the Revolutionary period, the grand jury served primarily to safeguard the accused. This safeguard was inserted in the amendment to the Constitution. No accused is to stand trial, in a criminal matter, where waiver is not involved unless an indictment is returned in a manner which protects the accused. Failure to transcribe reduces the grand jury to a mere matter of form, and raises an issue basic to the fair administration of justice. The failure to instruct with respect to the presumption arising from possession, and the rebuttal of that presumption, is in conflict with decisions that a trial court must instruct on basic issues in a case.

1. The Sufficiency of the Indictment Charging Possession of a Falsely Made Certificate. The indictment explicitly charges the petitioner with possession of a "falsely made" certificate (R. 5). However, the proof made at the time of the trial was that the certificate was genuine as to form and not counterfeit. This Court in construing statutes with comparable language has held that a statutory reference to false making of a certificate or a falsely made certificate refers to counterfeited instru-

ments. *United States v. Davis,* 231 U.S. 183, 187-188; *United States v. Staats,* 49 U.S. 41, 46. Other decisions have applied the same rule that a falsely made certificate refers to a counterfeit certificate in the technical sense: *United States v. Moore,* 60 Fed. 738, 739 (D.C.N.D.N.Y.); *United States v. Glascner,* 81 Fed. 566, 568 (D.C.S.D. Calif.); *United States v. Smith,* 262 Fed. 191, 194-195 (D. C.D. Ind.); *United States v. Mulligan,* 59 F.2d 200, 201 (C.C.A. 2); *United States v. Wentworth,* 11 Fed. 52, 55 (C.C.D. New Hampshire); *Wright v. United States,* 172 F.2d 310, 311 (C.A. 9); *Selvidge v. United States,* 290 F. 2d 894, 896 (C.A. 10); and *Martenay v. United States,* 216 F.2d 760, 763 (C.A. 10).

The distinction set forth by the cases is that "a falsely made instrument is one that is fictitious, not genuine . . . something other than what it purports to be without regard to the truth or falsity of the facts stated therein." *Wright,* supra, at p. 311. The trial court's refusal to grant the petitioner's motions for judgment of acquittal, and the ruling of the Court of Appeals are in conflict with the holdings of this Court and other lower courts. The insertion of false information in the genuine certification form did not render the certificate "falsely made". It is not the falsity of the information which brings the instrument within the meaning of the term but the counterfeit nature of the instrument itself. See *Gilbert v. United States,* 370 U.S. 650, 658.

The trial court took issue (R.74) with the Court of Appeals for the 2nd Circuit, *United States v. Turner,* 246 F.2d 228, which held that a stolen blank form was a certificate under 462(b)(2), saying that it did not believe the ruling in the *Turner* case should be adopted as law in this circuit. The trial court ruled, contrary to *Turner,* that Ex-

hibit 1 was only a piece of paper and became a certificate only when duly authenticated. The Court of Appeals below agreed with the trial court in this construction, pp. 483-484.

The indictment might have been laid under subdivision (2), (3) or (6) of the statute. It also might have been proper to charge that the filling in of the blank spaces constituted forgery, *Howgate v. United States,* 7 App. D.C. 217; *United States v. Pyler,* 222 U.S. 15; *United States v. Pyler,* 6 F.2d 668 (D.C.S.D.N.Y.).

(2) Failure to Transcribe Grand Jury Minutes, Denial of Fair Trial. This Court has ruled that on proper showing a defendant in a criminal trial is entitled to access to grand jury minutes as a matter of right. *United States v. Proctor and Gamble,* 356 U.S. 677; *Pittsburgh Plate Glass v. United States,* 360 U.S. 395; *Dennis v. United States,* 384 U.S. 855. The protection afforded a criminal defendant is an empty right easily circumvented, if the prosecution elects not to transcribe testimony before the grand jury, even when, as in this case, the accused insists upon the indictment procedure. If failure to produce grand jury testimony can render a witnesses' testimony inadmissible, *Dennis, supra,* p. 868, footnote 13, then failure on the government's part to transcribe so that testimony cannot be made available to the accused under any circumstances should logically render all of the testimony of the grand jury witnesses' testimony inadmissible, especially when the accused stands on his rights and refuses to waive indictment.

(3) Failure to Transcribe Grand Jury Minutes, Denial of Petitioner's Rights Under the Fifth Amendment to the Constitution. When the Petitioner was asked to

waive indictment by grand jury and he refused, he stood upon his Constitutional rights. The burden was then on the government to proceed via the indictment route but the government paid less than lip service to this procedure. Historically, the grand jury was more a shield of the accused rather than a vehicle to reduce an accusation to written form. The English writers took this view: Lord John Somers, *The Security of Englishmen's Lives, or the Trust, Power and Duty of Grand Juries of England* (Dublin, 1766); Sir John Hawles, *The Englishman's Right* (Boston) 1693, Alexander Brodie ed., Phila. 1798; and Henry Care, *English Liberties*, Fifth ed. (Boston) 1721. Somers referred to the protection of the grand jury saying: "The King's interest and honour is more concerned in the protection of the innocent, than in the punishment of the guilty." p. 36.

In protecting the accused, the English grand juries were cautioned to compare the testimony of each witness. Lord Somers thought that the separate examination of witnesses in secret would protect the accused and enable them to "compare all their several answers together, they might possibly discern marks enough of falsehood, to shew that their testimonies ought not to be depended upon . . ." p. 32. Care noted that the grand jury by examining witnesses secretly and separately could "note their Variations and Contradictions, to ask them sudden questions . . ." p. 209. The grand jury assumed a greater protective role here in pre-Revolutionary times. Younger, *Grand Juries and the American Revolution,* Virginia Magazine of History, Vol. 63, pp. 257-268. The works of Care and Hawles were available to and well considered by colonists in the use of grand juries, Richard D. Younger, *The People's Panel* (1963), Boston University Press, pp.

22-23; Charles Warren, *History of the American Bar,* (1913) Boston, p. 34.

The above writers all emphasize the role of the grand jury to scrutinize testimony of the witnesses with caution as Care said, *supra,* "they are sworn not only to inquire, but diligently to inquire . . . and sift the Witnesses . . ." p. 207. An accused must have the same right to "sift the witnesses" through the use of modern methods of transcription. The rule of secrecy has no application at the time of trial. Certainly, the early writers above speak of secrecy only *during* the grand jury procedure. The rule of secrecy during trial as invoked by this Court as a bar to access to grand jury minutes is reflected in *United States v. Proctor & Gamble Co.,* 356 U.S. 677, 681; *Pittsburgh Plate Glass Co. v. United States,* 360 U.S. 395; *United States v. Johnson,* 319 U.S. 503, 513, *Costello v. United States,* 350 U.S. 359, 362; and *Dennis v. United States,* 384 U.S. 855. None of these cases rest on or cite any precedent, with one exception, *infra,* for their rule that the rule of secrecy accompanies the grand jury witness into the trial court. In *Proctor & Gamble* this court in referring to the rule of secrecy relies upon *United States v. Rose,* 215 F.2d 617, 628-629 (C.A. 2), which in turn relies on *United States v. Amazon Industrial Corp.,* 55 F.2d 254, 261 (D.C.D. Md.) for the rule. But neither *Rose* nor *Amazon* cite precedent for this rule. Petitioner respectfully submits the above cases have been in error as a matter of legal history in holding that the rule of secrecy should apply at the time of trial.

(4) The Instruction on the Presumption. The statute says that on a trial for violation of subsection (b), a presumption arises from possession of an intent to use the card for purposes of identification and that the de-

fendant may overcome the presumption by explaining away the possession to the satisfaction of the jury. The trial court instructed the jury over objection that guilt could be found on proof of only three elements: (1) possession; (2) of a falsely made certificate; and (3) knowledge by the accused of the false making (R. 111). On this instruction, even the courtroom clerk who had physical possession of Exhibit 1 and who heard the defendant admit the card was not issued to him would be guilty and would be foreclosed from explaining away his possession. Similarly, the defendant who says he was unaware the card was in his possession is foreclosed. Since the presumption serves to put the burden of going forward to negative the presumed facts on the accused, *Casey v. United States,* 276 U.S. 413, 418, the accused is entitled to an instruction informing the jury that the presumed facts may be negated. See *Morrison v. California,* 291 U.S. 82, 96; *Yee Hem v. United States,* 268 U.S. 178; 9 Wigmore, *Evidence* §2485 (3rd ed. 1940); Model Penal Code, §1.12 (5) (Prop. Off. Draft 1962). The failure to instruct in accordance with the terms of the statute is in conflict with a well accepted rule acknowledged by this Court in *United States v. Gainey,* 380 U.S. 63, 64.

Conclusion

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

Opinion Below (372 F.2d 482)

Before LEWIS and ALDRICH, Circuit Judges; and STANLEY, District Judge.

STANLEY, District Judge.

Appellant was convicted of possession of a certificate purporting to be a Selective Service Registration Certificate, known by him to have been falsely made. The indictment clearly charges violation of the fifth clause of 50 U. S.C.A. Appendix, §462(b), which makes it an offense for any person to possess "any certificate purporting to be a certificate issued pursuant to [the Universal Military Training and Service Act] * * * which he knows to be falsely made * * *."

Appellant testified in his own behalf at his trial. He admitted that on the date charged he had in his possession the registration certificate which was introduced in evidence as government's Exhibit 1; that he had purchased it from one Chilly for five dollars; that Chilly had made it up in his presence; and that he himself had signed the name "Joe Scott" in the place provided for the signature of the registrant.

Government's Exhibit 1 purports to be a registration certificate, SSS Form No. 2, issued by Local Board No. 10, Jefferson County, Colorado, certifying that one Joseph Thomas Scott was duly registered November 22, 1961. It bore the number 15-10-43-103, and the signature of "Lois Maxton" as clerk of the local board. The Deputy State Director of Selective Service testified that the number shown on Exhibit 1 would not appear on a certificate

regularly issued by a Colorado board; that Local Board No. 10 had not had a clerk named Lois Maxton since enactment of the 1948 Selective Service Act; that the printed matter on the face of the exhibit conformed to that on certificates regularly issued by Colorado boards; and that a search of his records revealed no registrant named Joseph Thomas Scott.

Thus it was established that appellant had Exhibit 1 in his possession and that he knew the material inserted in the blank spaces on the exhibit had been placed thereon by persons other than those authorized to complete the form. If then, Exhibit 1 was in fact "a certificate purporting to be a certificate issued pursuant to" the Selective Service Act, violation of §462(b) was established.

Appellant argues that it is the false making of the form that is the basis of the offense, "not the filling in of spaces on a genuine form," and since there was no proof that the blank form was not genuine the government failed to prove violation of §462(b). This argument is unsound.

Exhibit 1, before its blank spaces were filled in by Mr. Chilly and appellant, was not a certificate. It did not even purport to be a certificate until the blank spaces were filled in and a signature purporting to be that of the clerk was affixed. A certificate is a document which serves as evidence or as written testimony of status. (See Random House Dictionary).

As was said by the Eighth Circuit in referring to a statute making it unlawful to use any false certificate of citizenship, "(a) certificate which is false in respect to those facts which alone would justify its issuance is as

much within the mischief of the statute as a forged or counterfeit instrument." *Dolan v. United States,* 133 Fed. 440, 451 (8th Cir. 1904).

Appellant complains of the refusal of the trial court to give a requested instruction:

> "The Court instructs the jury that if it should find from the evidence beyond a reasonable doubt, that the defendant had in his possession a registration certificate not duly issued to him, then such possession shall be deemed sufficient evidence to establish an intent to use such certificate by the defendant for purposes of false identification or representation, unless the defendant explains such possession to your satisfaction."

The requested instruction might properly have been given if the charge had been laid under the second clause of §462(b), having to do with possession of a certificate with intent to use it for purposes of false identification. The indictment here was not drawn under the second clause, and the trial court carefully and properly informed the jury as to the essential elements of the offense charged in the indictment.

The proceedings of the grand jury which indicted appellant were not recorded, no reporter being present. Appellant contends that failure to record and transcribe the testimony of grand jury witnesses operated to deprive him of his right to use their grand jury testimony for impeachment purposes at the trial. He does not complain of the trial court's refusal to require production of grand jury testimony as did the defendants in *Dennis v. United States,* 384 U.S. 855 (1966). Here, as in *Welch v. United*

States, ...F.2d.... (10th Cir. 1966) [No. 8097], the testimony had not been recorded and there was no transcript within the possession, custody or control of the government.

There is no requirement that grand jury proceedings be transcribed.* *United States v. Cianchetti,* 315 F.2d 584 (2d Cir. 1963).

We have examined the entire record and find no error.

AFFIRMED.

*Even under the 1966 amendment to Rule 16, F.R.Cr.P., authorizing production of a defendant's own grand jury testimony, "disclosure is required only where the statement has been recorded and hence can be transcribed." Notes of Advisory Committee, Rule 16(a)(3).

Appendix B 1

Constitution of the United States:

The Fifth Amendment provides, in part: No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury; —.

Statutes:

50 U.S.C., App. 462(b) provides:

Any person (1) who knowingly transfers or delivers to another, for the purpose of aiding or abetting the making of any false identification or representation, any registration certificate, alien's certificate of nonresidence, or any other certificate issued pursuant to or prescribed by the provisions of this title [Sections 451-454, 455-471 of this Appendix], or rules or regulations promulgated hereunder; or (2) who, with intent that it be used for any purpose of false identification or representation, has in his possession any such certificate not duly issued to him; or (3) who forges, alters, or in any manner changes any such certificate or any notation duly and validly inscribed thereon; or (4) who, with intent that it be used for any purpose of false identification or representation, photographs, prints, or in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any such certificate, or any colorable imitation thereof; or (5) who has in his possession any certificate purporting to be a certificate issued pursuant to this title [said sections], or rules and regulations promulgated hereunder, which he knows to be falsely made, reproduced, forged, counterfeited, or altered; or (6) who knowingly violates

or evades any of the provisions of this title [said sections] or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate, shall, upon conviction, be fined not to exceed $10,000 or be imprisoned for not more than five years, or both. Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of any certificate not duly issued to him, such possession shall be deemed sufficient evidence to establish an intent to use such certificate for purposes of false identification or representation, unless the defendant explains such possession to the satisfaction of the jury.